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## The insidious toxicity of investor-state arbitration *Gabriel Resources vs Romania*

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### ABSTRACT

Looking at the Investor-State Dispute Settlement (ISDS) case 'Gabriel Resources vs Romania', this paper documents the intangible losses, the chronic stress, and the damaged dignity of communities having to defend their livelihoods in the long-term ongoing conflicts over mineral resources. We expand the concept of environmental injustice as an 'insidious' form of toxicity 'poisoning' bodies even before chemical contamination, where the threat of ISDS is one of the many tools used by corporate power to reinforce itself. This paper answers scholarly calls for more empirical studies on the ISDS to expose the politics behind incommensurable valuation conflicts and justice as recognition. We analyse the ISDS case as part and parcel of the hegemonic extractivist logic of colonial power, capitalist accumulation by dispossession, and ontological occupation, which have left deep scars in the collective spaces of people imagining possible alternative futures.

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Environmental justice; Investor-State Dispute Settlement (ISDS); incommensurable/intangible loss and damage; democratic deficit; Roşia Montană

## Introduction: an old ongoing global controversy

Most environmental disruptions are 'actually legal and take place with the consent of society' (Skinner, 2013, p. 2). Many happen also in the framework of international investment law,<sup>1</sup> which allows investors to sue states directly via arbitration if they consider that their rights under an investment treaty have been breached, i.e. Investor State Dispute Settlement-ISDS (Sachs et al., 2020). In this article, we look at the struggle to represent the local community of Roşia Montană, (Alba County, Romania), in the International Centre for Settlement of Investment Disputes (ICSID) in Washington (2015–2024). After more than a decade of trying to implement an open-cast mine, in 2015, the Canadian company Gabriel Resources filed a notice of arbitration against Romania, accusing it of violation of bilateral investment treaties (Canada-Romania, UK-Romania) and of deliberately obstructing the mining project. We argue that despite the historical victory of the Romanian state, numerous losses and damages registered at the local level during a decade of arbitration illustrate a continuation of structural/ slow extractive violence and socio-environmental injustice. Testimonies regarding the lived experience of being exposed to the everyday fear of

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having to pay back the potential Award because of opposing an investment indicate a loss of trust in the possibility for a livable sustainable future. This paper is an answer to scholarly calls to take a ‘deeper dive’ empirically through ISDS case-studies that expose the politics behind incommensurable valuation conflicts and justice as recognition (Cotula & Perrone, 2024).

While the open cast mining project did not happen due to the local and (trans)national mobilization (Save Roşia Montană emblematic movement, see also Alexandrescu & Baldus, 2016; Goți, 2013; Pop, 2013; Soare & Tufiș, 2021; Triefus & Velicu, 2025; Velicu, 2015) the ISDS has affected the overall well-being and health of local residents, by reproducing tactics of coercion and consent making used by corporate representatives, such as threatening with debt. Using qualitative data and media analysis from Romania, we show how the ISDS verdict was expected with great apprehension as the trope of economic suffering naturalized in post-socialist public discourse (Anghel, 2016; Sîrbu & Polgár, 2009; Velicu, 2014b). Thus, we expand the concept of environmental injustice as an ‘insidious’ form of toxicity: local testimonies show us that a profoundly intimate form of toxicity poisoned their bodies even before any hazardous contamination, flowing in the air of the everyday ongoing conflict over mining (Velicu, 2020). The community felt exposed to nerve-racking controversies on costs and benefits, tearing apart their families and social relations. Humiliation, derision, deceit, gaslighting, intimidation, harassment, and abuse became normalized experiences, which eventually resulted in traumatic intangible loss and distress such as a sense of belonging, purpose, self-esteem, dignity, and agency. We, therefore, analyse the ISDS case as part and parcel of the hegemonic extractivist logic of colonial power (Quijano, 2000), capitalist ‘accumulation by dispossession’ (Harvey, 2003) and ‘ontological occupation’ (Escobar, 2021; Perrone, 2022), which have left deep scars in the collective physical space of people and in their (imaging) of possible alternative futures.

We started from the observation that legal studies on ISDS make similar arguments to EJ studies: the values and territorial imaginaries of local communities are perceived as backward and irrelevant in international tribunals (Cotula & Perrone, 2024; Schneiderman, 2022; Tienhaara, 2018; Triefus, 2024). We build on these arguments to further the body of scholarship challenging ISDS as an appropriate mechanism to decide on local development and reproducing socio-environmental injustice, because ‘Many of these participatory mechanisms have an “affinity” with the procedural logic of neoliberal governance, ignoring the material conditions that are necessary for genuine deliberation. ISDS exacerbates the risk-benefit disparity’ (Perrone, 2023, p. 3). Our aim to bridge the EJ and ISDS bodies of scholarship is a way to illustrate how justice-making in terms of human rights and the environment should remember that international law itself has been shaped by the structural violence of neoliberalism after 1989 and by the colonial ‘civilizing’ mission (Schneiderman, 2019). We also build on interdisciplinary debates, which, on the one hand, are calling for renewed, fair, and inclusive trade-making norms and international investment laws (Perrone, 2022; Triefus, 2024), and on the other hand, address numerous critiques of the extractive violence and environmental injustice around the globe (EJOLT, Temper et al., 2015). In Roşia Montană, this violence has affected the structure of property ownership, through land-grabbing, but also of the community, through depopulation, land dispossession, marginalization, disempowerment, and multiple forms of psycho-somatic harm and intergenerational trauma (Alexandrescu, 2020; Velicu, 2012, 2015, 2019, 2020). The result of these forms of harm may also be seen as environmental distress and solastalgia (Albrecht, 2020; Triefus & Velicu, 2025).

The case brings a novel empirical contribution to the global controversy regarding the limitations of public participation in international investment arbitration, and the normalization of ‘investor first’ hegemony (Perrone, 2022, 2023; Schneiderman, 2013, 2019, 2022; Tienhaara et al.,

2023). On the one hand, the ISDS mechanism chills states' capacity to create policies in the public interest, creating a fear of potential bankruptcy that feeds electoral processes and threats of austerity. On the other hand, ISDS also brings insidious forms of toxicity upon populations, paralysing fears and chronic stress about future debts that destroy the solace of people and their children and leave a legacy of vulnerability which makes people more susceptible to blackmailing. While impacts such as loss of well-being and chronic distress are still absent from public debates regarding the intangible costs of extractivism (Albrecht, 2011; Kennedy, 2016), ISDS seems to be for domestic policy what the nuclear threat is for foreign policy: a game of cards only elites can play as people cannot bluff about their traumas in everyday life.

After presenting the methodological aspects of our study, the next section theoretically frames the functions and mechanisms of ISDS as a justice and democratic deficit controversy. We proceed with the interpretation of our data in three analytical sections: one on the grassroots and judicial activism that culminated with the *Amicus Curiae* against the extractive violence of the company; the second analyses Romanian media and public statements around the date of the ISDS verdict; the third captures the local community's reception of the verdict and of future development dilemmas against a background of eroded trust and fragmented social fabric. This is then followed by a discussion on the limits of ISDS and the associated losses for the local communities.

## Methodology of the study

This paper is an interdisciplinary qualitative case study that illustrates, via interviews and media analysis, how one local community has engaged with and reacted to an ISDS case. The majority of literature on ISDS takes a strictly legal approach, whereas our study contributes to a small but growing body of legal literature that centres local community voices in the inquiry into ISDS (Cotula & Perrone, 2024; Perrone, 2022; Rogge, 2023; Triefus, 2024; Verbeek & Erol, 2024).

As part of a research project, between January and July 2024, we have worked both inductively and deductively on analysing how this controversial arbitration case has been addressed and framed publicly in Romania and how the dominant neoliberal narratives were reproduced or scrutinized by government officials, corporate media, and local residents (Phelan, 2014). Besides content analysis of the Arbitration case and the Award, we have carried out field trips in Roşia Montană in May and July 2024 to interview 31 residents (11 women and 20 men, of which 4 Roma women and 6 Roma men) and to participate in community events. The diversity of respondents allows for an intersectional understanding of impacts and precarity as they vary by location, class, ethnicity, gender, and age. The interviewees included local authorities, leaders of the local opposition against the mining project, leaders of the Roma community from Dăroaia, local entrepreneurs and other residents. In January 2025, we conducted an online interview with one of the lawyers who was directly involved in the submission of *Amicus Curiae* and other legal actions against the mining project's opposition over the last 20 years. The interviews have been analysed using Maxqda for coding along these dimensions in order to identify emerging patterns of response. We employed an intersectional approach to selecting our data to better grasp how the community has been fragmented along spatial, socio-economic, racial, gender, and generational lines.

Third, we carried out content analysis of public statements and analysed news and talk shows during winter and spring of 2024 to observe how the influence ecosystem is built (Wedel, 2017) and how the world hierarchies are reproduced (Shahin, 2023) in and by media framing. The analysis covered the following dimensions: (a) content bias (the journalists' attitude towards ISDS rulings, the Romanian authorities, and the mining project opponents); (b) contextualization (whether

the journalists provide in-depth context on ISDS or the history of the mining project and its opposition). The media analysis included data collected in two distinct periods corresponding to the first rumours, in January 2024 that ISDS would issue the final ruling and to the actual date when ISDS communicated its ruling (March 2024). For the first round of media monitoring, we collected 509 news items from 229 individual news sites from Romania, using a commercial online monitoring service of publicly available (indexed) content. Due to the high rate of redundancy of data, for the second part of the process, we narrowed down the sample to 5 all-news national TV channels and included in the analysis all news programmes and talk-shows aired on the day of ISDS's ruling (8 March 2024) and the day after.

## ISDS, a democratic justice controversy

If you wanted to convince the public that international trade agreements are a way to let multinational companies get rich at the expense of ordinary people, this is what you would do: give foreign firms a special right to apply to a secretive tribunal of highly paid corporate lawyers for compensation whenever a government passes a law to, say, discourage smoking, protect the environment or prevent a nuclear catastrophe. (The Economist, 2014, p. 78)

The formal institutionalization of ISDS can be traced back to 1965, when the World Bank established it through the Washington Convention to provide a purportedly neutral forum for arbitration between foreign investors and host states. While entities from extractive industries such as hydrocarbons and mining have constituted a significant proportion of claimants, the sectoral distribution of cases has been diversified. For a dispute to fall within the jurisdiction of ISDS tribunals, foreign investors must establish *prima facie* evidence that their economic interests have suffered material harm due to measures attributable to the host state that potentially violate substantive treaty protections, such as protection against uncompensated expropriation, denial of fair and equitable treatment, or discriminatory practices that impede their operations. In 2019, there were 983 such cases initiated against more than 100 states and only 36% of these were resolved in favour of the state (Weghmann & Hall, 2021).

Studies have shown that the threat and realization of investment arbitration claims can cause 'regulatory chill', a phenomenon where states change their behaviour towards foreign investors due to the fear of triggering huge compensation claims under investment treaties (Tienhaara, 2018; Tienhaara et al., 2023). This weakens states' capacity to protect public interests and implicitly affects democracy itself by creating a parallel preferential legal system or 'justice bubbles for the privileged' (Berge & Berger, 2021; Yilmaz Vastardis, 2018). Investment arbitration is asymmetrical in the sense that foreign investors have strong and enforceable rights, but only a few obligations (Jacobs, 2015). In addition, and crucial for our argument in this paper, the only parties admitted to take part in arbitral proceedings are states and corporations, thus silencing other affected parties such as local communities (Perrone, 2022; Sierra-Camargo, 2022). Numerous international law scholars have indicated problems of transparency and inclusiveness, as proceedings have often been secretive while the system for accepting witnesses or evidence has been unpredictable (Triefus, 2024; Verbeek & Erol, 2024). The only mechanism to bring civil society concerns to the arbitration table has been the *Amicus Curiae* or 'friend of the court'. However, this request is often rejected or even ignored in the final decision-making (Perrone, 2019; Triefus, 2024). As scholars of critical EJ studies have also argued, it seems pointless to ask for recognition (through local participation in *Amicus* for instance) from those whose exact power is based on indifference or erasure of other ways of thinking and living (Pulido & De Lara, 2018). As Perrone also argues, putting faith in

recognition and inclusion in such decision making should lead to overall reconsideration of a project in order to protect human rights because the entire set of rules and beliefs of arbitration itself would have to be changed beyond the colonial logic of locals as 'ignorant others' and towards locally embedded economies (Perrone, 2023). At the very basic level, the locals also want to be respected while their dignity as politically equal beings has been severely affected by histories of extractive violence (Velicu & Kaika, 2017).

Over the past 20 years, more and more countries in the Global South have begun to challenge the legitimacy of the ISDS mechanism; its practices and decisions are viewed as maintaining an unequal power relationship at the global level, a logic of colonialism (Sornarajah, 2015; Wegmann & Hall, 2021). Various controversies related to the integrity of arbitrators have been recorded over the years: the composition of arbitral tribunals reflects significant demographic homogeneity, with empirical data indicating that 82.4% of arbitrators are male, and 84.8% originate from high-income countries, predominantly from North America and Europe (Franck et al., 2015). This lack of diversity raises legitimate concerns about adequate representation and potential implicit biases in the adjudication of disputes involving natural resources between multinational corporations and mostly Global South states. As many legal scholars imply, the standard or hegemonic ideology of international law and trade treaties is the capitalist (Western/American) way of life. This automatically leads to a global political regime which is invisibilizing and discarding other ways of life and other legal/ontological/epistemological experiences. Despite Latin American attempts by various jurists to advance a pluralistic approach to the sources of IL, the current system is not open to reform its vision on private property and investments (Schneiderman, 2019).

While many accounts discuss ISDS critically, it is rather clear that demanding the Global South to pay awards is an insidious form of intergenerational injustice that does not recognize the ecodebt of the Global North after colonial conquest and industrialization (Hornborg & Martinez-Alier, 2016; Sharife & Bond, 2013). Environmental framing requires assumptions related to the social embeddedness of ecosystems and new forms of economic valuation (Martinez-Alier, 2012). For the business environment, large-scale mining is compatible with ecological protection. By contrast, for many communities and activists, certain values, such as ecosystem and human health, sense of place or self-reliance, are incommensurable and irreplaceable (Albrecht, 2020). However, the reasoning and decisions of the ISDS tribunals are often implicit in their institutional background, beliefs, and incentives irrespective of these competing values and imaginaries. As Cotula and Perrone (2024) argue, when analysing the case of Eco-Oro in Colombia, the problem is not whether the ISDS should consider environmental issues, but whose 'idea'/logic of these is being popularized and prioritized. Through the lens of International Investment Law, the 'environment' is just something to be predictable and calculable. Our previous papers on the case study showed that these incommensurable values have always been ridiculed or demonized in the decades of state-corporate-media promotion of the project (Velicu, 2015; Velicu & Kaika, 2017), which is an 'insidious' form of toxicity. Thus, we want to show here the clear continuity between corporate conduct in the prospective processes of proposing extractive projects and the injustice of ISDS: despite state victory in the tribunal, it fuelled decades of psychological war on the local community (Velicu, 2020).

Numerous dimensions of injustice unfold in ongoing conflicts over resources around the world which often end up in ISDS situations, and much of their associated forms of loss and damage is hidden in plain sight: that is because from the moment mega-development extractive projects are proposed, communities become exposed to daily psychological distress, feeling trapped in endless societal and family quarrels about the costs and benefits of such change, often involving abuse, intimidation and harassment, humiliation, deceit and even physical violence or murders (Arce &

Nieto-Matiz, 2024; Gamu & Dauvergne, 2018; Scheidel et al., 2020; Velicu, 2020). Such normalized violence installs itself insidiously in social relations of coercion, control and manipulation, leading to anguish and distress and even pre/post-traumatic stress disorders and may feed into extremism and populism, beneficial for the political games of elites.

Our case brings more illustration to what Escobar calls 'ontological occupation', a 'historically specific way of worlding that occupies the imaginative space of other peoples and places, rendering their world making ability ineffectual' (2021, p. 2) and the 'ontological dualism' between the company's harmful interventions in Roşia and its claim that it has been prevented, by the Romanian state, from actually implementing its project, which is 'at the heart of many of the most insidious problems' (Escobar, 2021, p. 7) of international trade and arbitrations world-wide. ISDS mirrors the privileges of the financial global elites of investors, who often have more rights than responsibilities especially for the outcomes of their activities, and whose awards are often calculated with reference to the imagined 'lost future profits', disregarding the (sometimes) state bankruptcy and community disarticulation which results from such awards.

### **The Save Rosia Montana movement: the larger context for the ISDS case**

Gabriel Resources became interested in gold from the oldest mining operation in Romania since the late 1990s, forming a joint venture with the Romanian state under the name of Rosia Montana Gold Corporation (RMGC). In times full of uncertainty during the post-socialist transition, the investor seemed to be the only salvation in the area. Local resistance to this project started in 2002, and was to reach national and international proportions over the next ten years, in one of the largest social movements in Romania (Alexandrescu, 2020; Goțiu, 2013; Triefus, 2024; Velicu, 2015, 2019, 2020). During these last decades, the local community has faced systematic deterioration of living and working conditions because the area was labelled as mono-industrial. The result of the company's campaigns has been the deepening fragmentation along racial, socio-economic, gender, and generational lines. At the beginning of the 2000s, there were almost 4000 people living in Roşia Montană; today there are just over 2400. Almost 1000 of them live in Dăroaia, a precarious area of Roşia, inhabited mainly by Roma, whose extreme poverty has deepened with the decline of the commune and the closing of the state-owned mine. Heritage and other buildings acquired by the company were left to degrade, leaving the remaining residents facing 'psychological, spatial, temporal and material layers of violence' (Velicu, 2020, p. 8) and having to make the difficult choice (or non-choice) between remaining or leaving (Velicu, 2014a).

By 2016, the investor came into possession of 78% of Roşia Montană houses and 60% of the surface rights. Numerous testimonies illustrate how the techniques used by the company have contributed to the internal conflicts and divisions within the community to obtain surface rights. Company employees harassed and threatened people who resisted the mine and were pressured to sell their land, including by making evaluations of their land without consent. Those who remained accused the deliberate strategy of the company to induce the perception that Roşia Montană has no alternatives; the tactics of intimidation included the continuous discourse about the backwardness of the current lifestyle and livelihood of residents, which further damaged their dignity as humans and political-economic agents, particularly so for the Roma residents and for widows of deceased miners. The opponents were characterized as traitors and disqualified as political subjects who can decide how to live their lives. They were shamed and ridiculed as primitive, nostalgic communists, with their subsistence economies devalued. All this invisible toxicity degrades everyday life, beyond the expected chemical toxicity of a mine, having to cope with

fear of (home) and community loss, uncertainty, and intergenerational conflicts (Triefus & Velicu, 2025). Residents remember the embodied distress of the last decades in an attempt to recollect the memory of intergenerational trauma:

My parents died of anger and stress because they [company] did not want to stop the [exploratory] drilling up on the hill ... were next to their house. [...] they played with the human psyche .... (Resident, Romanian man, July 2024)

I had moments when I was like: I'm going to crash, I can't take it anymore. They threatened to cut my head off, to burn my house down. They were driving around here trying to kill me. They almost killed me. (Local activist, man, July 2024)

This cannot be diluted until the generations that have been subjected to this trauma and this propaganda, which has lasted 13 years, will disappear ... the children who are now 25 years old ... know no other reality. (Resident, woman, May 2024)

For decades, the local grassroots NGO opposing the mine, Alburnus Maior, had no effective means to challenge the project other than to address the competent domestic courts to obtain information that should have been made public anyway. At least 83 court and administrative petitions were issued against the project between 2004 and 2016.<sup>2</sup> These efforts led to the annulment of 52 administrative acts and succeeded in substantially delaying the project. The Environmental Impact Assessment (EIA) process was suspended while there was pending litigation brought by Alburnus Maior concerning the required urban plans and certificates. Alburnus Maior initiated legal proceedings against the Ministry of Culture's decision to grant an archaeological discharge certificate (ADC) to RMGC which would remove national heritage protection from the Cârnic mountain, an area with the highest gold reserves in the planned exploitation.<sup>3</sup> Other courts found irregularities in how the ADC was issued and consequently annulled it.<sup>4</sup> Alburnus Maior also challenged the approval of the General Urban Plan (PUG) and the Zonal Urban Plan (PUZ), which declared Roșia Montană a mono-industrial zone and precluded the development of non-mining activities and businesses. The Ministry of Environment, therefore, decided that it could not continue the environmental impact evaluation procedure in the absence of all legal documents.<sup>5</sup> RMGC also tried, unsuccessfully, to use legal proceedings to harass and intimidate opponents, including filing a complaint against architects who publicly denounced the company's distorted use of their report, suing a journalist who opposed the project.<sup>6</sup> All these continued the extractive violence of the company at ground level and extended it to the allies of the locals.

More familiar to the collective memory are the massive protests in Romania's major cities in late 2013, when tens of thousands protested against the government, which proposed a special law for the mining project as 'national interest'. The protesters' stance was that 'The Corporation should not make Legislation.' Under such public pressure the Parliament rejected this law in mid-2014, which would have allowed mining under the terms proposed by RMGC and could have set a dangerous precedent. In 2015, when RMGC filed the notice of arbitration, they claimed that the government's actions were politically motivated, and influenced by NGOs or others who for political reasons sought to prevent or delay the project.<sup>7</sup> Romania counter-argued that the project never met the necessary environmental and cultural heritage requirements under Romanian law.

### A movement of Amici

Alburnus considered engagement with arbitration as a continuation of resistance to large-scale mining and intervened in the proceedings as an Amicus Curiae. Three Amicus Curiae submissions

were made by NGOs over the course of the arbitration proceedings, in 2018, 2022 and 2023. The 2018 Amicus was submitted by Alburnus together with Mining Watch and Greenpeace and contained (for the first time in an Amicus submission to an investment arbitration case) testimonies of local residents, along with facts about the background of the dispute and legal arguments concerning human rights. Those from 2022 and 2023 were submitted by national NGOs and also aimed to provide the Tribunal with facts and legal argumentation not raised by the parties. The 2018 Amicus submission drew on local testimonies, domestic law and international human rights law to shed light on how the company violated human rights norms on corporate social responsibility by failing to adequately engage affected stakeholders and violating the right to adequate housing and living conditions of local residents. It described the impact of the project on the local community, how they were prevented from developing businesses, the campaign of intimidation and harassment perpetrated by RMGC, false employment promises made by the company, and various pressure and manipulation tactics to convince people to sell.<sup>8</sup> Amici set out the serious deficiencies in RMGC's EIA Report submitted in 2006 and argued that the company failed to secure a social licence to operate (the acceptance of local communities). From the point of view of the local community, the main problem with the social licence was that its terms were never clear or transparent: among other insidious ways of securing consent, the company sometimes paid compensation in cash, and other times threatened with relocation.

The Tribunal accepted parts of the 2018 Amicus submission, but expressed 'serious doubts as to whether the Applicants will assist the Tribunal'<sup>9</sup> and 'concerns as to whether the Applicants have a significant interest in the proceedings'.<sup>10</sup> The Tribunal decided that references to or reliance on testimonies in the submission should be excluded on the basis that they would require testing by cross-examination.<sup>11</sup> The exclusion of local community testimonies and scepticism towards the relevance of the Amici's contribution shows that the forum of ISDS is not designed to include these voices. While some authors consider amicus curiae procedures to be a 'fundamental gateway for public participation in the arbitration process' (Dias Simões, 2021, p. 1371), many barriers to local communities participating as Amici curiae in investment arbitration remain (Mehranvar et al., 2024). Such barriers include need for expertise in investment law and procedure requiring financial or pro-bono support, lack of access to tribunal documents, page and time limits for interventions (Triefus, 2024), and difficulties convincing the tribunal of an organization's interest in the proceedings.<sup>12</sup> Even if these barriers are overcome, amicus submissions have seldom been influential in tribunal reasoning (Berger & Coleman, 2018; Schadendorf, 2015).

Mining Watch Romania and Greenpeace submitted two additional Amicus Curiae in 2022 and 2023. The 2022 intervention was a short submission with the sole purpose of informing the Tribunal that the parties had incorrectly argued that a particular administrative decision relevant to the case was final, while it had in fact been appealed and overturned.<sup>13</sup> The submission was admitted to the arbitral proceedings as both the company and the state agreed to it,<sup>14</sup> and the Tribunal included the information provided in the amicus in its award (e.g., para 1267 and subsequent analysis), though it was not key to the Tribunal's reasoning. A year later, a new Amicus Curiae submitted by the same organization, which highlighted the investor's inability to comply with the environmental standards applicable in the EU and Romania, was rejected on the basis that it would not assist the Tribunal in its decision-making, which was almost complete since the parties had already raised the facts in the submission.<sup>15</sup> The high number of amicus submissions in this case, with varying results, reveals the challenges faced by civil society organizations wishing to raise public interest issues in investment arbitration, and the tenacity of the civil society organizations involved in this case, who remained engaged throughout despite the barriers to participation.

Amicus interveners tend to intervene for multiple reasons. The decision to file Amicus submissions in the *Gabriel Resources v Romania* case was not only a legal strategy, but also a manifestation of distrust in the Romanian state's ability to speak for the local community, defend itself and act for the public interest. As one of the lawyers of the Save Rosia Montana movement told us, part of the motivation for submitting the amicus, even though they knew it might be (partly) rejected or ignored, was to put the information before the Tribunal and make it publicly available as part of Tribunal proceedings. The Amicus submission can then also serve to inform and inspire other community organizations faced with the necessity of intervening in ISDS proceedings.

The *Gabriel Resources v Romania* case is one of the few investment arbitration cases where a local community member has given evidence in the proceedings. One of the founding members of Alburnus Maior was asked by the Romanian state to speak in Washington as a witness. He was the only local from the Romanian delegation that was formed by various former and current state representatives, legal experts, or academics who had the opportunity to be the voice of Roşia Montană (Popescu, 2020). Initially, when approached by the legal team two years prior, he expressed mistrust, evoking longstanding 'humiliation' and 'impoverishment' of the community, accusing the Romanian government of complicity. Eventually, he agreed to present the local perspective, not to defend the state. After two years of thorough preparations and in very strict confidentiality conditions, he testified in front of the Tribunal, where he felt 'acknowledged and respected'. When interviewed in May 2024, he remained cautious about disclosing specific details of the hearing and despite the favourable ruling, he declined public honours or recognition.

I don't need their gratitude. My contentment is that Rosia is still standing. And that Roşia and Romania have been spared a huge debt that the politicians, not us, the opposition, would have done. (ICSID witness, man, May 2024)

The fact that states are beginning to call on local community witnesses in investment arbitration is a complex development for those affected by investment projects. On the one hand, participating in the arbitration was a meaningful experience for the witness from Rosia Montana, who felt it was important to tell his story to the Tribunal. On the other, investment arbitration is designed such that for this perspective to be shared, it has to be at the invitation of the state, which up until the moment of the dispute was colluding with the company in the dispossession of the local community. It is also unclear whether and how this testimony was taken into account by the Tribunal, which only cursorily refers to it in its reasoning. The 'use' of local community witnesses is no cure for the exclusive and asymmetrical nature of investment arbitration, and may in fact provide a veneer of legitimacy that serves to protect ISDS from calls for reform (Triefus, 2024).

It could be argued that the fact that Romania 'won' (or, more accurately, didn't lose) this case is evidence that ISDS 'works' and is not a danger to the public interest. However, a number of aspects of the decision mean that it is not necessarily a departure from previous awards that put pressure on government decision-making in the public interest. Only two out of the three arbitrators found for Romania, while the third arbitrator would have held Romania liable on the basis that its decision-making was 'politically motivated'.<sup>16</sup> The claimant is currently seeking annulment of the award, meaning that the dispute continues to drag on for the local community and threaten regulatory chill in circumstances where the threat posed by the arbitration has loomed large over Romania for a decade, and there has been significant discussion in politics and the media about restarting the gold mining project, as discussed below. The tribunal in its decision failed to engage with the perspectives of the local community at the centre of the dispute and their accounts of the company's aggressive and harmful conduct, despite having heard testimony from a local community

member and received extensive *amicus curiae* interventions. Further, the two arbitrators who found in Romania's favour did so by scrutinizing each step of decision-making very closely, rather than giving the state a wide discretion to be responsive to public input and submit public interest decisions to democratic fora, indicating that a slight change in facts could have cost Romania the case. Finally, one award does not negate the systemic problems of the ISDS system identified above.

### **Losers by default: a hegemonic media discourse**

In September 2023, the *Gabriel Resources v Romania Tribunal* announced that it was preparing to communicate a verdict in early 2024. In Romania, the information was distorted and instrumentalized by a good part of the media and politicians, who, for almost two months before the actual verdict, credited the idea that Romania would lose the case and pay compensation. The media discourse did not promote the state position in the Tribunal, but rather legitimized the hegemonic neoliberal discourse of a subaltern peripheral position within the global regime, that is, losers by default. We see this as another indirect impact of the ISDS power on the local community, an insidious psychological torture every time a Roşian was turning on the TV in the last decade, being repeatedly told that there is a lot of money to pay back 'because of their resistance' and because Roşia Montană was enlisted in UNESCO World Heritage in 2021 as a result of the Save Rosia Montana movement.

On the evening of 31 January 2024 the national news website *digi24.ro* published a news report with a seemingly neutral headline: 'Romania loses the trial with Gabriel Resources for Roşia Montană. We should pay at least two billion dollars'. The unverified news, which cited an anonymous government source, generated hundreds of headlines the next day and hours of heated debates on national TV stations. The news that Romania had lost and not that it might lose the Washington lawsuit generated public 'shock and awe' (Klein, 2007). The exorbitant sum seemed to be an economic disaster leading to the bankruptcy of an already cash-poor state. The astonishment was reinforced by the almost religious response from the media, the experts, and the politicians, where no one challenged the official frame (Entman, 2003). The Prime Minister set the tone, adopting the position of losers by default, and moralizing the 'stupidity' of those who contributed to the loss, which represented a large segment of civil society.

[I]’m used to the bills coming to me as Prime Minister for all the stupid things done by others. (...). Let’s see the amount they will decide. (PM Marcel Ciolacu, February, 2024)

The political and media elites created a hybrid influence ecosystem (Wedel, 2017), shifting the focus on individual or collective responsibilities of the Romanian state, politicians, and activists, reproducing the hierarchical world order (Shahin, 2023), a world in which the Tribunal was the unchallengeable authority. In the first 48 h, almost 100 news articles announced the unfavourable outcome of the ISDS proceedings for Romania, most of them mentioning Digi 24 as a primary source, and presenting the verdict as definitive. High-ranking politicians from the ruling party started the political instrumentalization and scapegoat hunting, especially within the opposition parties and among the former technocratic officials who initiated the UNESCO procedures. In the public discourse, terms such as 'compensation' or 'financial claims' were replaced by 'payment note', 'invoice' or 'bill', creating a lexicon of impending economic disaster.

A week later, amid this media and political hysteria, PM Ciolacu tried to temper the discussion and urged patience, pending an official communiqué from the Tribunal. The politician's gesture was belated and not at all credible, because the agenda had already been set. For the following

two weeks, the subject was used as a tool by the main ruling party to attack its opponents, a timely manoeuvre in Romania's pre-electoral context. It stimulated ad hoc investigations on mainstream TV channels, eager to hunt down the traitors opposing gold mining and who would be blamed for two more generations. Amid all this spectacle of disaster and prospective austerity, fundamental questions about the global controversies of ISDS have been absent. The politicians in power and the media failed to critically address ISDS practices, and the corrupt history of the RMGC was only marginally addressed.

In the dominant discourse, a Romanian state victory did not seem possible without further debate on ISDS. Furthermore, while the state appeared to be motivated solely by the fear of bankruptcy, the media was also trapped in the discourse of inevitability, projecting austerity scenarios generated by the unfavourable ruling. The Roșia Montană community was again excluded from this conversation, depicted as a place cursed to further impoverishment. Its long history of local resistance has been disregarded, as the dominant narrative was focused exclusively on the 2013 national protests, whereby the tens of thousands of protestors were deemed guilty for legislatively blocking the mining project. In this blame game, the 2017–2021 politicians, specialists or activists who pursued Roșia's inclusion as a UNESCO World Heritage site were accused of international conspiracy by some conservative media outlets and politicians. This discourse invisibilized the intergenerational trauma and numerous tangible and intangible losses endured by the community for decades.

The final decision, which came on 8 March 2024, was, in fact, a victory a la Pyrrhus (Perrone, 2022), a victory that has been unanimously excluded in all media programmes. On the verdict day, all news programmes covered the imminent defeat of the Romanian government in front of the Tribunal, using the same dramatic vocabulary and imagery. The catastrophic news discourse was filled with alarmist headlines announcing that the day of reckoning had arrived, and that billions of euros in payments were due. To highlight the budgetary impact of the compensation payments, some editors converted the billions of dollars into day centres for poor children that could have been built, or calculated how much each Romanian would have to pay. Around midnight, the Tribunal in Washington announced that it had rejected the financial claims of the Canadian corporation. The Canadian company had to pay the state approximately 6.6 million dollars for juridical expenses. It would have been an opportune time for political elites and the media to reflect on and rectify the disaster repertoire that had stunned Romanian society for nearly three months. However, the news was again instrumentalized for political gain to further demonize those who oppose development and perpetuate the ongoing ambivalence related to extractivism.

We won the Roșia Montană trial!!! We fought for Romania because it was unfair for every employee and pensioner of this country to be penalized for the wickedness of anti-Romanians! (PM Marcel Ciolacu, Facebook post; March 8, 2024)

Furthermore, one month after the ISDS decision was published, no detailed analysis or debate related to the arbitral tribunal's arguments was identified in the mainstream media (ActiveWatch, 2024). Notably, the entire spectacle of disaster unfolded in a fragile pre-electoral context in which citizens' trust in political parties and the press was extremely low: only 10% for politicians by the end of 2023 (IRES, 2023) and 27% for the press in 2024. One possible explanation for the low trust in the press is the opaque mechanisms through which parties subsidized the press over the past four years (Iosef, 2024; RSF, 2024). Lastly, throughout the history of the Roșia Montană conflict, numerous controversies have arisen in the public sphere regarding the mechanisms through which the mining company purchased the goodwill of the local and national press with generous advertising contracts and other incentives (Goți, 2013; Obae, 2010; Soare & Tufiș, 2021).

## Between lost hope and reconstruction?

We visited Roșia Montană in May 2024 to sense the local atmosphere following the arbitral process. We first talked to one elected representative, who has been in office for 16 years, and whose narrative was in line with the dominant one that was perpetrated by the political establishment and the media. He also disclosed that the ISDS ruling was not necessarily a victory for the entire community, as some of the residents were still hoping for a mine. They also expected that a negative outcome would have forced the Romanian part to compensate the Canadian company by giving clearance to start the operations.

They waited, in the community ... They all just surrendered for a couple of days and said nothing. (...) Their last hope had died. (Elected representative, man, May 2024)

During our follow-up visit to Roșia Montană, in mid-July 2024, we anticipated encountering a more enthusiastic community, invigorated by the favourable ISDS ruling. Rather than displaying enthusiasm, most of the residents exhibited a reticent attitude, marked by fatigue, hesitation, and a profound sense of distrust in the government and the local and regional authorities. Our arrival in the summer also coincided with the Tribunal's decision to temporarily suspend implementation of the March 8 ruling. Thus, it is plausible that this development contributed to the prevailing sense of discouraged winners suffering the anxieties of an ever-unfinished business of justice. Both a manifestation of distrust in the actual arbitration process and the general lack of information led some to speculate on conspiracy theories. In several informal discussions, some residents framed the ruling as a false act of justice, and more as a result of the geopolitical power game, where the US Government is 'keeping an eye on our gold'. We interpreted this stance as a potential symptom of the community's ongoing disenfranchisement, with a strong public perception that external powerful actors are determining its fate.

Some people in Roșia described the atmosphere before the verdict as reflecting the discourse at a national level, which blamed civic resistance. They were convinced that they would have to pay billions in damages because of environmental and heritage conservation NGOs, whose cause often runs parallel to the immediate interests of the population and who are trapped in the historical dilemma of 'jobs vs. nature'. Our respondents seemed uncertain about how Romania's victory would affect their lives. Among those in the community who want to demonstrate that mining is not the only option, there was scepticism that the company would leave. Testimonies reveal distrust and traumas that no public entity talks about and the mainstream media ignores.

We won the war, but there is a lot of destruction ... People want something to happen. The authorities don't move a finger ... No information about what UNESCO means. (Resident, man, July 2024)

[W]hen the rumor came, about three weeks before the verdict in Washington ... [prime minister] Cioloș came and said 'We have to pay six billion euros'. (...) Everyone was looking at us, that we, the activists, had to give the money (...) They saw us as pariahs! (Local priest, man, July 2024)

One local man described their loss as 'wounds to the soul', the company being perceived in military terms as a foreign occupation, in a psychological war of attrition. The company still owns 80% of the properties in Roșia Montană and this alone seems to cast a shadow on the future. As long as there is a gold deposit beneath Roșia, the place is viewed by all stakeholders as hostage to players in the extractive industry, or what is described in the literature as the 'curse of natural resources' (Corrocher et al., 2020).

Here we are talking, cynically, in numbers, about millions, billions of euros that have been funded just for community division. Things that have been done for no other reason than to reduce the community in every way: in numbers, in voice, in power. (Local activist, woman, May 2024)

They are in no hurry. They have enough time. Five years, ten years, twenty years. (...) They are, in a way, the masters here, because they own property. (Entrepreneur, man, July 2024)

The future is uncertain for the people of Roșia. Like many others, they are waiting for their state to take responsibility for the public planning of alternative locally, culturally meaningful forms of development, which are less harmful to (more-than)human existence and future generations. The location is still stuck in dilemmas of development, haunted by the ghost of extractivism, whilst alternative visions are controversial. Moreover, marginalized groups, particularly the Roma, experience even deeper forms of exclusion shaped by both racial discrimination and economic injustice and precarity. The ISDS case prolongs systemic violence, leaving these communities in limbo (lack of future), and hanging the prospect of huge financial loss above their heads. Romania winning the case does not change the reality of these impacts. Moreover, Gabriel Resources is now trying to have the case annulled and has submitted a new notice of dispute challenging Romania's refusal to renew its mining permit, so the saga is not over for Roșia Montana. The reaction to the fake news that Romania lost the case shows regulatory chill in action, where the threat of having to pay compensation leads governments to change (or reverse) actions that uphold human and environmental rights and to be less responsive to public protest.

### **The insidious violence of ISDS: conclusions**

Our case illustrates how, despite the victory of the state and formal public participation, the ISDS case has, in practice, impacted the local community in the same way as the corporation did. Its values and practices perpetuate extractive violence, instilling fear of debt, as a 'soft' technique of psychological warfare, and ignoring culturally/locally meaningful values and voices. Such actions are too insidious to be caught by legalistic notions of abuse, yet incredibly damaging in the embodied human sense and, in the long run, for the local communities. As a continuation of such toxic violence in an 'awfully lawful' way, ISDS is being legitimated by, and legitimates, the hegemonic power of financial elites, in a discourse that prioritizes investors' wealth over human-ecosystem health.

By recording the lived experience of people being exposed to the everyday fear of debt, we observed hesitance to celebrate the state's victory. They feel they merely continue to survive and struggle to find ways to make a living, 'as it has always been'. Most respondents lament the re-election of the same mayor, who had been accused of blocking the development plans or any initiative to improve the quality of life for all locals, from access to potable water for the Roma community to other infrastructure necessary to plan sustainable tourism. While some welcome the idea of tourism in the region, others believe that the mining nature of the locality will haunt the place forever: 'when They will want, They will mine', pointing to foreign forces that have a say over the 'weak' Romanian state. The disproportionate harm they seem to feel is not just in the distribution of costs or in the formal recognition as participants, but in the exact (re)production of some people as 'irrelevant' for arbitration, dispensable in the ongoing process of marginalization, abandonment, and acclimatization to anxiety and insecure futures (Brulle & Norgaard, 2019; Harvey, 1999; Velicu & Kaika, 2017). The 'right to exist and flourish' of these communities around the world is excluded a priori in the face of investors' 'right' to make a profit.

What is insidiously toxic is not only the repertoire of endless tactics of forcing vulnerable communities to accept what has often led to the end of their worlds but also how these hit the social

body, a trauma to be witnessed in the life stories of future generations. The arbitration case only added more scars to the already existing embodied distress, further shifting the socio-environmental costs and risks to the powerless (Sachs et al., 2020). First, ISDS ignores and thus validates the injustice of land-grabbing and slow community disappearance, privileging private interests over those of affected communities. The company's insidious violence was barely questioned during the arbitration, except with reference to its failure to obtain the social licence. Its 'ontological occupation' of the space and time of Roşia Montană was tacitly accepted within the ISDS.

Furthermore, ISDS continues the invisible practice of disqualifying residents as political subjects, mostly ignoring them even when formally accepted to take part in the process as Amicus. The Amicus Curiae initiated three times on behalf of the Roşia Montană community showed that the arbitral procedures are barely transparent. While the Amicus Curiae procedure is the only way for local communities to independently have a voice in proceedings, our case also shows how inadequate the Amicus mechanism is: testimonies were struck out, and there is nothing in the award to say that the first amicus was influential on the tribunal's reasoning. As the locals fear, the formal procedure allowed for the communities to defend themselves is, in practice, rather irrelevant and only adds to the hardship of having to mobilize and get support for such interventions. Instead, as scholars argue, states should revise their bilateral investment treaties to protect the rights of local communities, rather than signing up for a legal framework that privileges investors over communities in the first place. Local participation can hardly resolve forms of structural violence but it nevertheless shows that there is a pressure from below for having a voice.

There was an overwhelming feeling that Save Roşia Montană campaigners would be to blame had Romania lost the case, insidiously adding to the overall harassment that has damaged the lives of residents in the last decades. Alternative future perspectives and reparations were not even considered valid during the arbitration. The validation of competing values itself – say health – seems irrelevant for the ISDS – the international legal profession itself owes heavily to the imperial demands of capital importing 'great nations' imposing market demands as the global 'rule of law' (Schneiderman, 2019). If the focus so far has been to cure the alleged wounds of the investors, repeatedly being bailed out of disasters while gaslighting societies with trickle-down developmentalist stories, the current planetary plural crisis should urge all of us to face the scars on social fabrics. The ways in which such marginalization happens is very subtle and normalized behind the legality or correctness of formal public procedures, a preliminary pre-procedural problem of justice (Velicu & Kaika, 2017), or what we called here an insidious form of toxicity. This is part of a repertoire of coercive tactics typically employed by state and corporate officials, which consists of blackmail, harassment, intimidation, deceit, humiliation, verbal and physical violence or restriction of basic rights (Arce & Nieto-Matiz, 2024; Velicu, 2020; Verweijen & Dunlap, 2021; Vélez-Torres & Méndez, 2022).

Any structural holistic reform of this international legal mechanism seems impossible as it would contradict its initial meaning – which was to protect investors' profits (Tienhaara, 2018). The threat of ISDS is only one of the many tools used by corporate power to reinforce itself, together with lobbying, or (mis)information campaigns. Its mere existence is sufficient to discourage, delay, or drop policies of public interest and overall, to instil fear in both people and states. While political participation and collective capabilities have often been proposed as complementary environmental justice mechanisms, we can see how, from the start, the ISDS mechanism, composition and procedure would easily obstruct such ideals: another example of how little meaningful change occurs within the economic-legal and cultural patterns that perpetuate disparities, as most EJ studies documented (Pellow, 2016; Pichler, 2016; Pulido & De Lara, 2018).

The story of insidious extractive violence we illustrated here would not be complete without acknowledging that such violence has always been questioned, resisted, and coped with at the local level. Despite the ban on any non-industrial activity, several initiatives have emerged: the Made in Roşia Montană small manufacturing and clothing retailer, the Adopt a House in Roşia Montană architectural restoration project, or the Living with a Purpose tourism project – may not ‘save’ locals from hardship, but illustrate the colossal struggle people have to wage in order to survive in the current hegemony of extractivist economic development.

## Notes

1. In this article, ‘international investment law’ is used to refer to investor-state arbitration conducted pursuant to bilateral and multilateral investment treaties and contracts between foreign investors and states.
2. For a list of these proceedings (with many entries censored), see *Gabriel Resources Ltd. and Gabriel Resources (Jersey) v Romania*, ISDS Case No. ARB/15/31, Respondent’s Memorial, Annex IV.
3. *Gabriel Resources v Romania*, Amicus Curiae Submission (2 November 2018), p. 12.
4. Brasov Court of Appeal, Sentence No. 157/F/CA (26 November 2007) and Ploieşti Court of Appeal, Decision No. 187 (16 February 2022).
5. *Gabriel Resources v Romania*, Respondent’s Counter-Memorial (2018), para 605.
6. *Gabriel Resources v Romania*, Amicus Curiae Submission (2 November 2018), p. 6.
7. *Gabriel Resources v Romania*, Claimant’s Memorial (2017), para 167.
8. *Gabriel Resources v Romania*, Amicus Curiae Submission (2 November 2018).
9. *Gabriel Resources v Romania*, Procedural Order 19 (2018), para 60.
10. *Gabriel Resources v Romania*, Procedural Order 19 (2018), para 64.
11. *Gabriel Resources v Romania*, Procedural Order 19 (2018), para 60.
12. See, for example, *Odyssey Marine Exploration Inc v United Mexican States*, ICSID Case No. UNCT/20/1, Procedural Order No. 6 (20 December 2021) and *Aris Mining Corporation (formerly known as GCM Mining Corp. and Gran Colombia Gold Corp.) v. Republic of Colombia (Gran Colombia Gold Corp v Colombia)*, ICSID Case No. ARB/18/23, Procedural Order No. 10 (31 August 2021).
13. *Gabriel Resources v Romania*, Amicus Curiae Submission (19 September 2022).
14. *Gabriel Resources v Romania*, Claimants’ Observations on the non-disputing parties’ application (30 September 2022); Respondent’s Observations on the non-disputing parties’ application (30 September 2022).
15. *Gabriel Resources v Romania*, Procedural Order 36 (2023).
16. *Gabriel Resources v Romania*, Note of Dissent of Horacio A. Grigera Naon (8 March 2024), para 2.

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